FILED
OCT 20 1997
CLERK

(2)

No. 97-308

# In the Supreme Court of the United States

OCTOBER TERM, 1997

PIKEVILLE UNITED METHODIST HOSPITAL OF KENTUCKY, INC., PETITIONER

*v.*

UNITED STEELWORKERS OF AMERICA, AFL-CIO, ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT*

## BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

SETH P. WAXMAN
*Acting Solicitor General*
*Department of Justice*
*Washington, D.C. 20530-0001*
*(202) 514-2217*

FREDERICK L. FEINSTEIN
*General Counsel*

LINDA SHER
*Associate General Counsel*

NORTON J. COME
*Deputy Associate General Counsel*

JOHN EMAD ARBAB
*Attorney*
*National Labor Relations Board*
*Washington, D.C. 20570*

25 pp

## QUESTIONS PRESENTED

1. Whether the National Labor Relations Board reasonably concluded that petitioner is not a "State or political subdivision thereof" exempt from the Board's jurisdiction under Section 2(2) of the National Labor Relations Act, 29 U.S.C. 152(2).

2. Whether the Board acted reasonably in concluding that it should no longer decline, as a matter of discretion, to exercise jurisdiction over certain employers who provide services to or for governmental entities that are exempt from the Board's jurisdiction, and that it should exercise jurisdiction over any such employer who meets the statutory definition of "employer" and applicable monetary jurisdictional amounts.

3. Whether a Board procedural rule precluded the Board from reconsidering, in the unfair labor practice proceeding in this case, its decision in a prior representation case that it would not, as a matter of discretion, exercise its statutory jurisdiction over petitioner.

## TABLE OF CONTENTS


| | Page |
|---|---|
| Opinions below | 1 |
| Jurisdiction | 1 |
| Statement | 2 |
| Argument | 9 |
| Conclusion | 21 |


## TABLE OF AUTHORITIES

Cases:


| | |
|---|---|
| *ARA Services, Inc.* v. *NLRB*, 71 F.3d 129 (4th Cir. 1995) | 13 |
| *Board of Trustees of Memorial Hospital* v. *NLRB*, 624 F.2d 177 (10th Cir. 1980) | 13, 17 |
| *East Oakland Community Health Alliance, Inc.*, 218 N.L.R.B. 1270 (1975) | 7 |
| *Human Development Assoc.* v. *NLRB*, 937 F.2d 637 (D.C. Cir. 1991), cert. denied, 503 U.S. 950 (1992) | 16 |
| *International Ladies' Garment Workers' Union* v. *Quality Mfg. Co.*, 420 U.S. 276 (1975) | 12 |
| *Jefferson County Community Center for Developmental Disabilities, Inc.* v. *NLRB*, 732 F.2d 122 (10th Cir.), cert. denied, 469 U.S. 1086 (1984) | 11, 17 |
| *Management Training Corp.*, 317 N.L.R.B. 1355 (1995) | 6, 9, 11, 14, 15, 16, 18, 20 |
| *NLRB* v. *Austin Developmental Center, Inc.*, 606 F.2d 785 (7th Cir. 1979) | 18 |
| *NLRB* v. *Deena Artware, Inc.*, 361 U.S. 398 (1960) | 13 |
| *NLRB* v. *E.C. Atkins & Co.*, 331 U.S. 398 (1947) | 18, 19 |
| *NLRB* v. *Kemmerer Village, Inc.*, 907 F.2d 661 (7th Cir. 1990) | 16 |
| *NLRB* v. *Natural Gas Utility District of Hawkins County*, 402 U.S. 600 (1971) | 4, 8, 9, 10 |

Cases—Continued: Page

*NLRB* v. *Pope Maintenance Corp.*, 573 F.2d 898 (5th Cir. 1978) ..... 17
*National Transportation Service, Inc.*, 240 N.L.R.B. 565 (1979) ..... 18
*Res-Care, Inc.*, 280 N.L.R.B. 670 (1986) . 4, 5, 14, 16, 17, 18
*St. Francis Hospital*, 271 N.L.R.B. 948 (1984) ..... 20
*Teledyne Economic Development* v. *NLRB*, 108 F.3d 56 (4th Cir. 1997) ..... 9, 14, 17
*Truman Medical Center* v. *NLRB*, 641 F.2d 570 (8th Cir. 1981) ..... 11
*Universal Camera Corp.* v. *NLRB*, 340 U.S. 474 (1951) ..... 11, 13
*Woelke & Romero Framing, Inc.* v. *NLRB*, 456 U.S. 645 (1982) ..... 12

Statutes and regulations:

National Labor Relations Act, 29 U.S.C. 151 *et seq.*:
§ 2(2), 29 U.S.C. 152(2) ..... 2, 4, 6, 7, 9, 15, 17, 18
§ 9(c)(1), 29 U.S.C. 159(c)(1) ..... 7
§ 10(a), 29 U.S.C. 160(a) ..... 7
§ 10(e), 29 U.S.C. 160(e) ..... 12
§ 14(c)(1), 29 U.S.C. 164(c)(1) ..... 2
29 C.F.R.:
Section 102.48(d)(1) ..... 12
Section 102.67(f) ..... 20

# In the Supreme Court of the United States

OCTOBER TERM, 1997

---

No. 97-308

PIKEVILLE UNITED METHODIST HOSPITAL OF KENTUCKY, INC., PETITIONER

*v.*

UNITED STEELWORKERS OF AMERICA, AFL-CIO, ET AL.

---

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT*

---

## BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

---

### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 105a-127a) is reported at 109 F.3d 1146. The decision and order of the National Labor Relations Board (Pet. App. 1a-4a) and the decision of the administrative law judge (Pet. App. 5a-104a) are reported at 318 N.L.R.B. 1107. The Board's decision in the representation proceeding (Pet. App. 129a-136a) is unreported.

### JURISDICTION

The judgment of the court of appeals was entered on May 14, 1997. Pet. App. 137a-143a. A petition for rehearing was denied on June 26, 1997. Pet. App. 128a. The petition for a writ of certiorari was filed on

August 15, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

1. Section 2(2) of the National Labor Relations Act (Act), 29 U.S.C. 152(2), provides, in pertinent part, that "[t]he term 'employer' * * * shall not include * * * any State or political subdivision thereof." Section 14(c)(1) of the Act, 29 U.S.C. 164(c)(1), provides, in pertinent part, that "[t]he Board, in its discretion, may * * * decline to assert jurisdiction over any labor dispute involving any class or category of employers, where, in the opinion of the Board, the effect of such labor dispute on commerce is not sufficiently substantial to warrant the exercise of its jurisdiction."

2. Petitioner is a private nonprofit corporation that operates a hospital in Pikeville, Kentucky. Pet. App. 8a, 43a, 112a. Petitioner was originally incorporated in 1923 as the Methodist Hospital of Kentucky. *Id.* at 106a. In the mid-1960s, to raise funds required by petitioner to renovate and expand the hospital, the City of Pikeville (City) created a holding company, the Pikeville, Kentucky Public Hospital Corporation (Corporation), to issue tax-exempt bonds for the construction costs. *Id.* at 8a. As part of the financing mechanism, petitioner conveyed its ownership interest in the hospital's property to the City, and the City conveyed the property to the Corporation. The Corporation then leased the property back to the City, and the City in turn sublet the property back to petitioner. *Id.* at 8a-9a, 106a.

The sublease between petitioner and the City provided that petitioner "shall manage and operate" the hospital "pursuant to the directions of the City."

Pet. App. 10a; see also *id.* at 152a-168a. In fact, the City did not become involved in the management or operation of the hospital. Only once, in 1971, did the hospital submit its budget to the City for approval, and the City never audited the hospital's costs or approved the hospital's rates. "Prior to 1991 there is no evidence that the City was directly involved in the daily administration, operation or management of the hospital facility or influenced the [hospital's] labor relations." *Id.* at 107a.

3. a. In the summer of 1990, the United Steelworkers of America (Union) began an organizing campaign among petitioner's non-professional employees. Pet. App. 13a, 108a. On October 29, 1990, the Union filed a representation petition requesting an election with the National Labor Relations Board (Board). *Id.* at 6a. Petitioner requested that the Board dismiss the Union's petition for lack of jurisdiction. *Id.* at 130a. In the fall of 1990, the Union also filed unfair labor practice charges with the Board based on incidents during the organizing campaign. *Id.* at 5a. On January 4, 1991, the Board's Acting Regional Director (ARD) issued a complaint against petitioner, based on the Union's unfair labor practice charges. *Ibid.* In answering the complaint, petitioner reasserted its jurisdictional defense. *Id.* at 14a. The ARD ordered the hearing on the Union's unfair labor practice charges postponed pending consideration of the jurisdictional issue in the representation case. *Id.* at 144a.

On January 14, 1991—while a hearing in the representation case was in progress before the Board's hearing officer—the City Commission of the City of Pikeville passed a resolution, ostensibly pursuant to its authority under the sublease. Pet. App. 14a. The

resolution provided, in pertinent part: "[Petitioner] shall not enter into any contract of employment, whether individually extended or collectively bargained * * * without the express written consent of the [City] or its designated representative." *Id.* at 15a; see also *id.* at 169a-170a.

b. On July 3, 1991, the ARD dismissed the Union's representation petition. Pet. App. 129a-136a. Initially, the ARD rejected petitioner's contention that it was exempt from the statutory definition of "employer" under Section 2(2) of the Act as a "political subdivision" of the State of Kentucky. *Id.* at 134a. The ARD stated that an entity is an exempt "political subdivision" under Section 2(2) "if it is either: (1) created directly by the state so as to constitute a department or an administrative branch of government; or (2) administered by individuals who are responsible to public officials or to the general electorate." *Id.* at 133a (citing *NLRB* v. *Natural Gas Utility District of Hawkins County*, 402 U.S. 600 (1971)). The ARD found that petitioner was not a "political subdivision" under either prong of that test because it was concededly not "created by the City or any other governmental entity" (*ibid.*), and because its board of directors, petitioner's "policy-making body," lacked "direct personal accountability to the City or the general public." *Id.* at 134a.

The ARD nonetheless concluded that "it would not effectuate the purposes and policies of the Act" for the Board to assert its jurisdiction over petitioner. Pet. App. 136a. In reaching that conclusion, the ARD applied the analysis required by the Board's decision in *Res-Care, Inc.*, 280 N.L.R.B. 670 (1986). In *Res-Care*, the Board held that it would decline to exercise its jurisdiction over employers that provided services

to or for exempt governmental entities unless the employer in question retained "final say on the entire package of employee compensation, i.e., wages and fringe benefits," on the reasoning that "meaningful bargaining is not possible" for employers without such a "final say." *Id.* at 674. The ARD concluded, based on *Res-Care*, that petitioner lacked "sufficient control over employment conditions to engage in meaningful negotiations." Pet. App. 136a. The ARD relied on the City Commission's then-recent resolution prohibiting the hospital from entering into employment contracts without its consent, which, he believed, demonstrated that "the City now acts in a controlling rather than advisory capacity with respect to wages, benefits and personnel policies." *Id.* at 135a. The ARD also noted that, on the record before him, there was no evidence that the resolution was "a sham transaction devised to evade the Board's jurisdiction." *Ibid.* The Board denied the Union's request for review of the ARD's decision in the representation case. *Id.* at 7a.

c. On November 2, 1992, petitioner moved for summary judgment in the unfair labor practice proceeding. Pet. App. 7a. Petitioner argued that the Board's jurisdictional ruling in its favor in the representation case precluded the Board's General Counsel from relitigating that issue in the unfair labor practice proceeding. *Id.* at 146a. The Board denied petitioner's motion, finding that it raised "genuine issues of material fact which would best be resolved after a hearing before an administrative law judge." *Id.* at 147a.

d. On July 8, 1994, an administrative law judge (ALJ) issued a decision on the Union's unfair labor practice charges, finding that petitioner had engaged

in several unfair labor practices. Pet. App. 5a-104a. On the question of jurisdiction, the ALJ concluded that the Board should exercise its jurisdiction over petitioner. The ALJ first ruled that the Board's jurisdictional ruling in the representation case did not preclude relitigation of that issue in the unfair labor practice case. *Id.* at 40a-43a. The ALJ also determined, as had the ARD, that petitioner was not a "political subdivision" of the State of Kentucky exempt from the Board's jurisdiction under Section 2(2) of the Act. *Id.* at 27a-29a. But unlike the ARD, the ALJ concluded that the facts before him indicated that the Board should as a matter of discretion exercise its jurisdiction under *Res-Care*. *Id.* at 38a. The ALJ found that the City's ostensible control over petitioner, purportedly established by the sublease and the City Commission's January 14, 1991 resolution, was "a sha[m] designed solely to defeat the Board's jurisdiction." *Id.* at 30a. The ALJ found that the City Commission's "actions designed to show city control are only an illusion and not a reality," and that even after the 1991 resolution, the City "did nothing thereafter but grant routine approval of [petitioner's] actions or requests for action." *Id.* at 31a.

4. The Board affirmed the ALJ's findings and conclusions and adopted his recommended remedial order. Pet. App. 1a-4a. The Board noted that, after the issuance of the ALJ's decision, it had overruled its *Res-Care* decision in *Management Training Corporation*, 317 N.L.R.B. 1355 (1995), which "established a new test for the assertions of jurisdiction over employers who operate pursuant to contracts with exempt governmental entities." Pet. App. 2a. Under *Management Training*, the Board

"will now consider only whether the employer meets two criteria: (1) the definition of 'employer' under Section 2(2) of the Act and (2) the applicable monetary jurisdictional standards." *Ibid.* The Board found that petitioner "meets both criteria of *Management Training*." *Ibid.*[1] The Board further concluded, in agreement with the ALJ, that even under its former *Res-Care* standard, "the Board's jurisdiction over [petitioner] is warranted here," because the City Commission's resolution purportedly changing the relationship between itself and petitioner "was a sham transaction," and petitioner "retained sufficient control over essential terms and conditions of employment to enable it to engage in meaningful collective bargaining." *Id.* at 3a.

5. The court of appeals enforced the Board's order in relevant part. Pet. App. 105a-127a. The court held first that petitioner was not a "political subdivision" of the State of Kentucky exempt from the Board's jurisdiction under Section 2(2) of the Act. The court stated that an entity is statutorily exempt from Board jurisdiction only if it is either "(1) created

---

[1] The Act authorizes the Board to conduct elections where a representation question "affecting commerce" exists, and to prevent unfair labor practices "affecting commerce." 29 U.S.C. 159(c)(1), 160(a). Under the Board's established monetary jurisdictional standards for identifying those cases in which the effect of a labor dispute on commerce would be sufficiently substantial to warrant the exercise of the Board's jurisdiction, a hospital must, among other things, have gross annual revenues exceeding $250,000. Pet. App. 3a, 114a n.4; *East Oakland Community Health Alliance, Inc.*, 218 N.L.R.B. 1270 (1975). Petitioner does not challenge the Board's finding (Pet. App. 3a) that it satisfied the applicable monetary jurisdictional standard.

directly by the state, so as to constitute [a] department[] or administrative arm[] of the government, or (2) administered by individuals who are responsible to public officials or to the general electorate." *Id.* at 111a-112a (quoting *NLRB* v. *Natural Gas Utility District of Hawkins County*, 402 U.S. 600, 604-605 (1971); brackets in court of appeals' opinion). Petitioner, the court concluded, "possesses neither of the recognized attributes of a statutorily exempt employer." Pet. App. 112a. First, petitioner was concededly created as a private entity. Second, although the City appoints the members of the board of directors of the holding company (the Corporation),

> [n]o law or ordinance, however, requires that the board of directors of [petitioner] be elected by the general populace or requires that those board members be public officials also serving on the board of the holding company. In fact, many individual hospital board members who are responsible for administration of [petitioner] have no connection whatsoever with the holding company board of directors or with the Pikeville municipal government. The record in this matter contains absolutely no evidence to support the contention that the City of Pikeville has authority to control the membership of the *hospital's* board of directors.

*Ibid.*

The court also rejected petitioner's argument that the Board lacked authority to adopt its new *Management Training* standard. The court held that "the Board has offered a supportable rationale for its decision to alter the *Res-Care*, Inc. standard," namely, that " '[i]t was shortsighted . . . for the

Board to declare [in *Res-Care, Inc.*] that bargaining is meaningless unless it includes the entire range of economic issues.' * * * [T]he focus of negotiations may be upon such matters as job security, job classifications, employer flexibility in assignments, employee involvement or participation and the like," Pet. App. 115a (quoting *Management Training*, 317 N.L.R.B. at 1357), all of which may be within the power of the employer. The court expressly agreed with a similar decision of the Fourth Circuit, *Teledyne Economic Development* v. *NLRB*, 108 F.3d 56 (1997), also upholding the Board's adoption of the *Management Training* rule. Pet. App. 116a.

**ARGUMENT**

The decision of the court of appeals, upholding the Board's conclusion that petitioner is not statutorily exempt from its jurisdiction as a political subdivision of a State, and also upholding as reasonable the Board's decision to exercise its jurisdiction over petitioner, is correct. That decision does not conflict with any decision of this Court or of another court of appeals. Further review is therefore not warranted.

1. Petitioner contends (Pet. 19-20) that, under *NLRB* v. *Natural Gas Utility District of Hawkins County*, 402 U.S. 600 (1971), it is a "political subdivision" of the State of Kentucky within the meaning of Section 2(2), and therefore exempt from the Board's jurisdiction. There is no merit to that contention. In *Hawkins County*, the Court concluded that a utility district was a "political subdivision" of the State of Tennessee because it was "administered *by individuals who are responsible to public officials* or to the general electorate." *Id.* at 605-609. The Court noted, among other things, that a state statute

"ma[de] crystal clear that [the utility district] is administered by a Board of Commissioners appointed by an elected county judge, and subject to removal proceedings at the instance of the Governor, the county prosecutor, or private citizens." *Id.* at 605. Other aspects of state law provided that the utility district's proceedings were subject to public records laws, the district had the power of eminent domain, and the district commissioners had the power of subpoena, all of which reinforced the conclusion that the district was a political subdivision rather than a private corporation. *Id.* at 607-609.

The Board's conclusion that petitioner is not a "political subdivision" of the State of Kentucky is fully supported by the record. Unlike the utility district in *Hawkins County*, petitioner's board of directors is not "responsible to public officials or the general electorate." Rather, as the ARD, the ALJ, and the Board found (Pet. App. 28a), "the City has no authority to decide the composition or structure of [petitioner's] board of directors which is, in essence, its policy-making body." Although the City appoints the directors of *the holding company—i.e.*, the Corporation—some of whom also happen to sit on petitioner's board, nothing requires that there be an identity of composition between the board of directors of the holding company and the board of directors of the *hospital*, which is the petitioner here. As the court of appeals found, "[i]n fact, many individual hospital board members who are responsible for administration of [petitioner] have no connection whatsoever with the holding company board of directors or with the Pikeville municipal government." *Id.* at 112a. And although petitioner argues (Pet. 20) that, in effect, its board of directors is

"responsible to public officials" because petitioner is supposedly "subject to the plenary control of the City," the ALJ found (Pet. App. 30a), and the Board agreed (*id.* at 3a), that the City's ostensible control over petitioner's operations was merely a "sha[m] designed solely to defeat the Board's jurisdiction." Those factual findings of the Board raise no issue warranting further review. See *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 490-491 (1951).[2]

2. a. Petitioner contends (Pet. 9-19) that the Board's exercise of jurisdiction over it based on *Management Training Corp.*, 317 N.L.R.B. 1355 (1995), is unreasonable and contrary to the National Labor Relations Act. Petitioner is jurisdictionally barred from challenging the validity of the *Manage-*

---

[2] Given the Board's findings, upheld by the court, petitioner is incorrect in asserting (Pet. 20) that "it is undisputed that members of Petitioner's Board of Directors are responsible to the elected officials of the City of Pikeville." Nor is petitioner correct in suggesting (*ibid.*) that a City resolution (see Pet. App. 172a-175a), that directed petitioner to amend its articles of incorporation in various ministerial respects compelled a finding that it is a "political subdivision." That resolution does not demonstrate that petitioner's board of directors is "responsible to public officials" in any legally significant sense. Of greater significance is the fact that the City "has no authority to decide the composition or structure of [petitioner's] board of directors." Pet. App. 28a. Cf. *Jefferson County Community Center for Developmental Disabilities, Inc.* v. *NLRB*, 732 F.2d 122, 126 (10th Cir.) (employer not a "political subdivision" where a majority of board of directors was "neither appointed by nor subject to removal by public officials or the general electorate"), cert. denied, 469 U.S. 1086 (1984); *Truman Medical Center* v. *NLRB*, 641 F.2d 570, 573 (8th Cir. 1981) (same conclusion, where 31 of 49 directors were neither appointed nor subject to removal by public officials or general public).

*ment Training* rule in this Court. Section 10(e) of the Act, 29 U.S.C. 160(e), provides that "[n]o objection that has not been urged before the Board * * * shall be considered by the [reviewing] court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances." Petitioner did not challenge the *Management Training* rule before the Board; it challenged that standard for the first time in the court of appeals. Petitioner could have raised its challenge before the Board by filing a motion for reconsideration, once the Board issued its decision to assert jurisdiction over petitioner pursuant to *Management Training*. See Pet. App. 2a-3a; 29 C.F.R. 102.48(d)(1). Petitioner has pointed to no "extraordinary circumstances" excusing its failure to raise its claim before the Board. Accordingly, petitioner is jurisdictionally barred by Section 10(e) from asserting its claim in this Court. See *Woelke & Romero Framing, Inc.* v. *NLRB*, 456 U.S. 645, 665-666 (1982); *International Ladies' Garment Workers' Union* v. *Quality Mfg. Co.*, 420 U.S. 276, 281 n.3 (1975).

Furthermore, the Board specifically found that assertion of jurisdiction over petitioner was warranted even under its old *Res-Care* standard. Pet. App. 3a. The Board upheld the ALJ's findings that the City Commission's January 14, 1991, resolution purporting to prevent petitioner from negotiating any collective bargaining agreement without its consent was "a sham transaction," and that after passage of the resolution, petitioner "retained sufficient control over essential terms and conditions of employment to enable it to engage in meaningful collective bargaining." *Ibid.* Because the outcome of this case would therefore not have been different even if the

Board had adhered to the standard now championed by petitioner, petitioner's challenge to the *Management Training* standard is academic. And although petitioner argues that the Board lacked jurisdiction over it even under the *Res-Care* standard (Pet. 20-22), the Board's rejection of that argument based on the specific facts of this case raises no important legal issue warranting review by this Court. *Universal Camera, supra.*[3]

---

[3] There is no merit to petitioner's argument (Pet. 21) that the Board erred as a matter of law in concluding that the City Commission's resolution was a sham. The Board has authority to disregard "paper arrangements that do not reflect the business realities." *NLRB* v. *Deena Artware, Inc.*, 361 U.S. 398, 403 (1960). Although petitioner relies on *Board of Trustees of Memorial Hospital* v. *NLRB*, 624 F.2d 177 (10th Cir. 1980) (see Pet. 12), there the court in fact recognized the Board's authority to examine both the parties' contracts and their actual practices. See 624 F.2d at 185. In that case, the court emphasized that there was "no suggestion" of "devious maneuvers" or "misstated documents," *id.* at 184, whereas in this case the Board found that the City Commission's resolution was a "facade," not intended to increase the degree of the City's actual control over petitioner (Pet. App. 31a). *ARA Services, Inc.* v. *NLRB*, 71 F.3d 129 (4th Cir. 1995), also relied on by petitioner (Pet. 21), did not involve an attempt by a governmental entity to place a private employer beyond the Board's jurisdiction through the promulgation of a resolution found by the Board to have been a mere sham. In that case, the court refused to consider the "historical relationship" between the private and governmental entities, and gave dispositive weight to "the substance of the parties' own agreement," which made the governmental unit ultimately responsible for setting wages and benefits. 71 F.3d at 134. The *ARA* court did not state, however, that arrangements on paper completely at odds with the reality of the relation between a private and a governmental entity must be given controlling weight by the Board.

b. Even if petitioner's claim were properly presented, further review of the Board's *Management Training* standard would not be warranted. The only other court that has addressed the validity of the *Management Training* standard has also upheld it. See *Teledyne Economic Development* v. *NLRB*, 108 F.3d 56, 59 (4th Cir. 1997) ("*Management Training* rule is a permissible exercise of the Board's jurisdiction under the plain language of the [Act]"). And as both courts of appeals have concluded, the Board's decision in *Management Training* is fully consistent with the National Labor Relations Act.

In *Res-Care, Inc.*, 280 N.L.R.B. 670 (1986), the Board held that, where "the scope and degree of control exercised by the exempt entity over the [statutory] employer's labor relations" demonstrated that the statutory employer "does not have the final say on the entire package of employee compensation, i.e., wages and fringe benefits," it would not "effectuate the purposes and policies of the Act" for the Board to assert jurisdiction. *Id.* at 672, 674. Such statutory employers were seen to "lack[] the ability to engage in the necessary 'give and take' which is a central requirement of good-faith bargaining, and which makes bargaining meaningful." *Id.* at 674. But in *Management Training Corporation*, the Board, after reexamining the matter in depth, concluded that "the emphasis in *Res-Care* on control of economic terms and conditions was an oversimplification of the bargaining process." 317 N.L.R.B. at 1357. The Board explained (*ibid.*):

> While economic terms are certainly important aspects of the employment relationship, they are not the only subjects sought to be negotiated

> at the bargaining table. Indeed, monetary terms may not necessarily be the most critical issues between the parties. In times of downsizing, recession, low profits, or when economic growth is uncertain or doubtful * * * the focus of negotiations may be upon such matters as job security, job classifications, employer flexibility in assignments, employee involvement or participation and the like.

Finding that its *Res-Care* decision had been "shortsighted" in "declar[ing] that bargaining is meaningless unless it includes the entire range of economic issues" (317 N.L.R.B. at 1357), the Board held that, "in determining whether the Board should assert jurisdiction, the Board will only consider whether the employer meets the definition of 'employer' under Section 2(2) of the Act, and whether such employer meets the applicable monetary jurisdictional standards." *Id.* at 1358. The Board emphasized, however, that "[t]he [e]mployer in question must * * * control some matters relating to the employment relationship, or else it would not be an employer under the Act." *Ibid.*

c. Petitioner argues principally (Pet. 11-13) that the *Management Training* rule is inconsistent with Section 2(2) of the Act, and that the *Res-Care* standard was compelled by the Act. But as the court of appeals correctly explained, the *Res-Care* standard was not mandated by Section 2(2). Pet. App. 114a-115a. Rather, Section 2(2) "simply and straightforwardly exempts only certain named governmental units and other organizations from the reach of the NLRB." *Id.* at 114a. Private firms that do not retain control over "the entire package of employee

compensation" (*Res-Care*, 280 N.L.R.B. at 674) because of a contractual relationship with an exempt governmental entity do not fall within any of the statutory exemptions. The *Res-Care* test was therefore "only a tool previously used by the Board to define the parameters of the agency's *discretionary*, as opposed to statutory, jurisdiction." Pet. App. 115a; see also *Teledyne*, 108 F.3d at 59; *Human Development Assoc.* v. *NLRB*, 937 F.2d 657, 660 (D.C. Cir. 1991), cert. denied, 503 U.S. 950 (1992); *NLRB* v. *Kemmerer Village, Inc.*, 907 F.2d 661, 663 (7th Cir. 1990).

Nothing in the Act requires the Board to refuse jurisdiction over private entities acting as contractors for the government if those entities meet the statutory definition of an "employer." If an entity does not control at least "some matters relating to the employment relationship," *Management Training*, 317 N.L.R.B. at 1358, then it cannot engage in meaningful collective bargaining, and it is not an "employer" within the meaning of the Act. The Act does not further prohibit the Board from exercising jurisdiction over entities that do meaningfully control aspects of the employment relationship, but may not make the final determination with regard to wages and benefits. "When enacting Section 2(2), Congress was surely aware that private employers contracted with government entities to provide needed goods and services. Congress could not have intended to compel the Board to decline jurisdiction over private employers based on constraints that their government contracts might impose upon the collective bargaining process. If it had so intended, it would have exempted private contractors as well as

governmental entities from the Act." *Teledyne*, 108 F.3d at 59.

The decisions of the courts of appeals cited by petitioner (Pet. 12) do not hold that the Board's *Res-Care* test was compelled by Section 2(2). For example, in *NLRB* v. *Pope Maintenance Corp.*, 573 F.2d 898 (5th Cir. 1978), the court stated that the "jurisdiction of the Board is to be declined if the employer does not retain sufficient control over the employment relationship to engage in meaningful collective bargaining." *Id.* at 902. While that language does indicate that the statutory definition of "employer" requires that the employer be able to engage in meaningful collective bargaining, it does not suggest that meaningful collective bargaining can exist only when the employer retains control over "the entire package of employee compensation" (*Res-Care*, 280 N.L.R.B. at 674).[4] To the contrary, as the Board concluded in *Management Training*,

---

[4] Petitioner's reliance on *Board of Trustees of Memorial Hospital* v. *NLRB*, 624 F.2d 177 (10th Cir. 1980), is flawed for the same reason. There, the court stated that, where the employer at issue "does not retain sufficient control over the employment relationship to engage in meaningful collective bargaining, [Section] 2(2) deprives the Board of jurisdiction because the exempt [entity] is deemed the true employer." *Id.* at 185. The court did not hold, however, that "sufficient control * * * to engage in meaningful collective bargaining" (*ibid.*) requires the employer to retain control over "the entire package of employee compensation." Indeed, the Tenth Circuit subsequently stated that "the jurisdictional test does not require that an employer control all terms and conditions of employment, but only that he retain enough control to bargain effectively." *Jefferson County Community Center for Developmental Disabilities, Inc.* v. *NLRB*, 732 F.2d 122, 127, cert. denied, 469 U.S. 1086 (1984).

meaningful collective bargaining can occur in many situations where bargaining can affect important incidents of the employment relationship, albeit not "the entire package." See 317 N.L.R.B. at 1357 (discussing federal-sector collective bargaining); *NLRB* v. *Austin Developmental Center, Inc.*, 606 F.2d 785, 789 n.8 (7th Cir. 1979) (Board "may require collective bargaining even where the employer's relationship to the exempt entity places it under substantial hardships in labor negotiations, as long as it retains some control over terms and conditions of employment").[5]

d. The Board's *Management Training* standard is also consistent with this Court's decision in *NLRB* v. *E.C. Atkins & Co.*, 331 U.S. 398 (1947). The question in *E.C. Atkins* was "whether private plant guards, who are required to be civilian auxiliaries to the military police of the United States Army, are employees within the meaning of [Section] 2(3) of the [Act]." *Id.* at 399. The Court agreed with the Board that the private employer "retained a sufficient residual measure of control over the terms and conditions of employment of the guards so that they might fairly be described as employees of the [private employer]." *Id.* at 412-413 (internal quotation

---

[5] Contrary to petitioner's contention (Pet. 11-12), the Board did not hold in prior decisions that Section 2(2) compelled it to adopt its former *Res-Care* test. The Board made clear, in fashioning that test, that it was exercising its discretion to decline to assert jurisdiction over a class of statutory employer. See *Res-Care*, 280 N.L.R.B. at 670 n.1 (issue is "whether, in exercising our discretion, we should decline to assert jurisdiction"); *National Transportation Service, Inc.*, 240 N.L.R.B. 565, 566 (1979) ("right of control" test is a "standard for determining discretionary jurisdictional issues").

marks omitted). The Court did not hold, however, that control over employee wages and benefits is a prerequisite of an employer-employee relationship under the Act; rather, the Court reasoned that such a relationship "may spring as readily from the power to determine the wages and hours of another * * * as from the absolute power to hire and fire or the power to control all the activities of the worker." *Id.* at 413-414. Thus, the Court explained that "where the conditions of the relation are such that the process of collective bargaining may appropriately be utilized as contemplated by the Act, the necessary relationship may be found to be present." *Id.* at 414.

The Board has concluded that collective bargaining may be effectively used when the employer retains the ability to negotiate over some aspects of the employment relationship, albeit not the "entire package of employee compensation," as required by *Res-Care*. That judgment is consistent with the Court's observation in *E.C. Atkins* that an employer-employee relationship under the Act may well arise from sources other than "the power to determine the wages and hours of another" (*id.* at 413), and represents a reasoned judgment based on the policies of the Act. Petitioner posits several hypothetical scenarios (Pet. 15-16) that, it suggests, show that the Board will find an employer guilty of an unfair labor practice for refusing to bargain with the union over employment terms as to which it has no control. In *Management Training*, however, the Board stated that it was "unnecessary to consider specifically the circumstances under which the Board would or would not find that an employer had committed an unfair labor practice by failing to bargain over a matter asserted to be beyond the employer's control."

317 N.L.R.B. at 1359. Should a situation arise in which an entity charged with an unfair labor practice for refusing to bargain with a union maintains that it had no control over the disputed employment terms, the Board will have ample authority to determine whether it would be consistent with the policies of the Act to sustain an unfair labor practice charge in such a situation. No such issue was before the Board in this case, however, as the Union did not charge petitioner with an unlawful refusal to bargain with it, nor does the Board's order require petitioner to bargain with the Union. See Pet. App. 4a, 44a-47a, 98a-101a.

3. Finally, petitioner contends (Pet. 22-25) that, under the Board's procedural rules, the ALJ should not have permitted the relitigation of the jurisdictional issue in the unfair labor practice proceeding because the Board had previously refused to review the ARD's conclusion, in the representation proceeding, that the Board should not exercise its discretion over petitioner under *Res-Care*. That argument rests on a misreading of the relevant rule. The rule in question, 29 C.F.R. 102.67(f), provides that, in a representation case, "[d]enial of a request for review [by the Board] shall * * * preclude relitigating any such issues in any related subsequent unfair labor practice proceeding." As the Board has interpreted that rule, however, it "applies [only] to the *parties*—the employer and the union—and does not preclude the Board from reconsidering its own earlier action." *St. Francis Hospital*, 271 N.L.R.B. 948, 949 (1984). Thus, the Board was not barred from reconsidering its earlier refusal to exercise jurisdiction over petitioner in the representation case.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

SETH P. WAXMAN
*Acting Solicitor General*

FREDERICK L. FEINSTEIN
*General Counsel*

LINDA SHER
*Associate General Counsel*

NORTON J. COME
*Deputy Associate General Counsel*

JOHN EMAD ARBAB
*Attorney*
*National Labor Relations Board*

OCTOBER 1997